No. 48802-7-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

JESSE LEO ARNESTAD,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 15-1-00094-4
The Honorable Michael Schwartz, Judge

OPENING BRIEF OF APPELLANT

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1. The trial court erred by denying Jesse Arnestad's motion to dismiss the residential burglary and theft charges for lack of evidence.

2. The State failed to prove beyond a reasonable doubt every element of the crimes of residential burglary and theft.

3. Any future request by the State for appellate costs should be denied.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Where the only evidence linking Jesse Arnestad to the crimes was a latent fingerprint found on a closet door of a home where his friend lived, and where the State must show in "fingerprint only" cases that the area was inaccessible to the defendant at a previous time, did the State fail to meet its burden of proving beyond a reasonable doubt that Arnestad committed the crimes of residential burglary and theft? (Assignments of Error 1 & 2)

2. If the State substantially prevails on appeal and makes a request for costs, should this Court decline to impose appellate costs where the trial court found that Jesse Arnestad does not have the present or future ability to pay

trial costs, he has previously been found indigent, and there is no evidence of a change in his financial circumstances? (Assignment of Error 3)

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Jesse Leo Arnestad with one count of residential burglary (RCW 9A.52.025) and one count of first degree theft (RCW 9A.56.020, .030). (CP 3-4) The trial court denied Arnestad's motion to dismiss for lack of proof brought after the State rested its case-in-chief. (RP 495-505) The jury convicted Arnestad as charged. (CP 26-27; RP 578) The trial court denied the State's request for an exceptional sentence, and imposed a standard range sentence totaling 84 months. (RP 616-17; CP 85) The trial court also found that Arnestad was indigent and did not have the ability to repay costs, and ordered only mandatory legal financial obligations (LFOs). (RP 617; CP 83-84) Arnestad timely appeals. (CP 98)

B. SUBSTANTIVE FACTS

Hwa Cha Park lives in a house on Sourth 95th Street in Tacoma. (RP 197) Annie Padgett is Park's grown daughter. (RP 198) For several months in 2014, Padgett and her boyfriend,

Brandon O'Neil, lived in the home with Park. (RP 199, 451-52) Padgett and O'Neil later had a child together. (RP 452)

Park believed that Padgett and O'Neil were taking illegal drugs. (RP 200) Park was also suspicious when O'Neil began bringing valuable items into the house that he claimed to be selling for a relative. (RP 200, 269, 274-75, 279) Park told Padgett and O'Neil to move out in July or August of 2014. (RP 200, 275) Padgett and O'Neil complied, but did not return the house keys that Park had given them. (RP 200, 201)

Park's suspicions were justified. Padgett and her friends had been breaking into homes and stealing valuable items, then selling them and purchasing drugs with the proceeds. (RP 453, 464, 485) According to Padgett, O'Neil did not participate in the burglaries, but he helped sell the stolen items. (RP 485-86) Padgett and O'Neil were arrested and charged in connection with these criminal activities. (RP 253-54, 453)

Park kept valuable items in her master bedroom and in a safe located inside the closet of the bedroom. (RP 208-10) Padgett and O'Neil knew about the items and about the safe. (RP 211, 489-90) When Park arrived home from work on October 28, 2014, she found that her television and computer were missing

from her living room, that her master bedroom had been ransacked, and that her safe had been taken. (RP 202, 203, 206-07) She could see holes in the back wall of the closet where the safe had been secured, and what appeared to be smeared blood near the holes. (RP 234, 235-36, 322)

Neither Park nor the responding police officers saw any evidence of a forced entry into the house. (RP 214, 252, 316) Only the bedroom had been disturbed. (RP 247) In addition to the electronic items, much of Park's jewelry, $1,000.00 in cash, spare car keys, and important personal and legal documents were taken. (RP 203, 208-09, 210, 249)

Park suspected that O'Neil was involved in the burglary. (RP 252) So Park called Padgett and told her what had happened, and begged Padgett to talk to O'Neil and to try to at least get the important documents back to her. (RP 254-55) About a month later, Padgett brought the documents to Park. (RP 256) According to Padgett, she asked O'Neil to give the documents back, then a few days later she found them outside the door of the house where she had been staying. (RP 255-56, 459)

A crime scene technician located a partial latent fingerprint on the mirrored door of the closet in the master bedroom. (RP 340-

41) The print matched a known fingerprint for Jesse Arnestad. (RP 377) When shown a picture of Park's house, Arnestad said he did not recognize it and did not think he had been to the house. (RP 435) When told about the presence of his fingerprint, Arnestad asked if the questioning had to do with Brandon O'Neil. (RP 437-38)

Padgett testified that Arnestad and O'Neil were friends and that she had met Arnestad once. (RP 454) She and O'Neil occasionally had friends over to her mother's house when they lived there. (RP 492-93) Park also acknowledged that Padgett and O'Neil might have had friends visit the house when they lived there. (RP 265)

Padgett testified that Arnestad was not involved in the burglaries and trafficking that she had committed with O'Neil and her other friends. (RP 464, 485) And Padgett denied any involvement in the burglary of her mother's house. (RP 460) But she testified that she saw Arnestad on the day that her mother's home was burglarized, and that his hand appeared to be injured. (RP 455, 458)

IV. ARGUMENT & AUTHORITIES

A. ASIDE FROM ONE PARTIAL FINGERPRINT, THERE IS NO EVIDENCE CONNECTING ARNESTAD TO THE BURGLARY AND THEFT CHARGES, AND THEREFORE INSUFFICIENT EVIDENCE TO CONVICT HIM OF THESE CRIMES.

"Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt." City of Tacoma v. Luvene, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Salinas, 119 Wn.2d at 201.

To convict Arnestad of residential burglary, the State had to prove that, "with intent to commit a crime against a person or property therein [he] "enter[ed] or remain[ed] unlawfully in a dwelling[.]" RCW 9A.52.025. And to convict Arnestad of theft, the State had to prove that he "wrongfully obtain[ed] or exert[ed]

unauthorized control over the property or services of another … with intent to deprive him or her of such property[.]" RCW 9A.56.020.

In this case, the State did not present any evidence or testimony to establish that Arnestad entered Park's home on the day of the burglary, or that Arnestad ever obtained or controlled any of the items taken from Park's home, or that Arnestad acted as an accomplice to another person in their commission of these crimes. The only evidence that potentially placed Arnestad inside the home was a partial fingerprint lifted from the closet door.

Fingerprint evidence is sufficient to support a conviction if the trier of fact could infer from the circumstances that the fingerprint could only have been impressed at the time of the crime. State v. Bridge, 91 Wn. App. 98, 100, 955 P.2d 418, 419 (1998) (citing State v. Lucca, 56 Wn. App. 597, 599, 784 P.2d 572 (1990)). Thus, in order to support a finding of guilt beyond a reasonable doubt in a "fingerprint-only" case, the State must make a showing, reflected in the record, that the object upon which the fingerprint was found was generally inaccessible to the defendant at a previous time. Bridge, 91 Wn. App. at 100 (citing Mikes v. Borg, 947 F.2d 353, 357 n. 6 (9th Cir.1990)). This showing by the State

is essential. Bridge, 91 Wn. App. at 100 (citing Mikes, 947 F.2d at 356-57).

The State did not make this required showing here. Arnestad was friends with O'Neil, and O'Neil lived at Park's home for several months. (RP 199, 452) O'Neil had visitors during the time he lived there. (RP 492-93) Arnestad could have had access to the home and to the bedroom at a time other than the day of the burglary.

Thus, the State's evidence does not support the inference that Arnestad could only have accessed the bedroom closet and left an imprint on the day of the burglary. He may have improperly accessed the bedroom and touched the closet door on another day, as Park had not given Padgett and O'Neil permission to go into her bedroom closet. But that does not establish that Arnestad was involved, as either a principal or accomplice, in the burglary of Park's home on October 28.

The reviewing court should reverse a conviction and dismiss the prosecution for insufficient evidence where no rational trier of fact could find that all elements of the crime were proven beyond a reasonable doubt. State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996); State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d

900 (1998). Because no rational trier of fact could have found beyond a reasonable doubt that Arnestad committed the residential burglary and theft based on the evidence presented by the State, this Court must reverse the convictions and dismiss the charges.

B. ANY FUTURE REQUEST FOR APPELLATE COSTS SHOULD BE DENIED.[1]

Under RCW 10.73.160 and RAP Title 14, this Court may order a criminal defendant to pay the costs of an unsuccessful appeal. RAP 14.2 provides, in relevant part:

> A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review.

But imposition of costs is not automatic even if a party establishes that they were the "substantially prevailing party" on review. State v. Nolan, 141 Wn.2d 620, 628, 8 P.3d 300 (2000). In Nolan, our highest Court made it clear that the imposition of costs on appeal is "a matter of discretion for the appellate court," which may "decline to order costs at all," even if there is a "substantially prevailing

[1] Recently, in State v. Sinclair, Division 1 concluded "that it is appropriate for this court to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellant's brief." 192 Wn. App. 380, 389-90, 367 P.3d 612 (2016). Arnestad is including an argument regarding appellate costs in his opening brief in the event that this Court agrees with Division 1's interpretation of RAP 14.2.

party." Nolan, 141 Wn.2d at 628.

In fact, the Nolan Court specifically rejected the idea that imposition of costs should occur in every case, regardless of whether the proponent meets the requirements of being the "substantially prevailing party" on review. 141 Wn.2d at 628. Rather, the Court held that the authority to award costs of appeal "is permissive," so that it is up to the appellate court to decide, in an exercise of its discretion, whether to impose costs even when the party seeking costs establishes that they are the "substantially prevailing party" on review. Nolan, 141 Wn.2d at 628.

Should the State substantially prevail in Arnestad's case, this Court should exercise its discretion and decline to award any appellate costs that the State may request. First, Arnestad owns no property or assets, has no savings, and has no job and no income. (CP 100-01) Arnestad will also be incarcerated for the next 84 months. (RP 616-17; CP 85) And, finding that Arnestad will not likely have the ability to pay LFOs now or in the future, the trial court declined to order Arnestad to pay any non-mandatory trial LFOs. (RP 617; CP 83-84) Thus, there was no evidence below, and no evidence on appeal, that Arnestad has or will have the ability to repay additional appellate costs.

Furthermore, the trial court found that Arnestad is indigent and entitled to appellate review at public expense. (CP 617, 104-05) This Court should therefore presume that he remains indigent because the Rules of Appellate Procedure establish a presumption of continued indigency throughout review:

> A party and counsel for the party who has been granted an order of indigency must bring to the attention of the trial court any significant improvement during review in the financial condition of the party. The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent.

RAP 15.2(f).

In State v. Sinclair, Division 1 declined to impose appellate costs on a defendant who had previously been found indigent, noting:

> The procedure for obtaining an order of indigency is set forth in RAP Title 15, and the determination is entrusted to the trial court judge, whose finding of indigency we will respect unless we are shown good cause not to do so. Here, the trial court made findings that support the order of indigency.... We have before us no trial court order finding that Sinclair's financial condition has improved or is likely to improve. ... We therefore presume Sinclair remains indigent.

192 Wn. App. 380, 393, 367 P.3d 612 (2016). Similarly, there has

been no evidence presented to this Court, and no finding by the trial court, that Arnestad's financial situation has improved or is likely to improve. Arnestad is presumably still indigent, and this Court should decline to impose any appellate costs that the State may request.

V. CONCLUSION

The State failed to show that the closet door was inaccessible to Arnestad at any time other than on the day of the burglary. The State did not present sufficient evidence, beyond the fingerprint, to connect Arnestad to the crimes. Arnestad's residential burglary and theft convictions must be reversed and dismissed with prejudice. This Court should also decline any future request to impose appellate costs.

DATED: September 7, 2016

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CERTIFICATE OF MAILING

I certify that on 09/7/16, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Jesse L. Arnestad # 869991, Washington Corrections Center, P.O. Box 900, Shelton, WA 98584.

Stephanie Cunningham

STEPHANIE C. CUNNINGHAM, WSBA #26436

CUNNINGHAM LAW OFFICE

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